

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

GREGORY A. VANDYKE,  
Plaintiff,

vs.

Case No. 2004-1833-CK

SUBURBAN HOME SALES, INC.,  
a Michigan corporation, KELLER WILLIAMS  
REALTY LAKESIDE MARKET CENTER,  
a Michigan corporation, DAVID M. KLAFT,  
LAURIE BENIGNI, RE/MAX ADVANTAGE I,  
INC., a Michigan corporation, THOMAS J. FIGLAN,  
ROBERTA RASMUSSEN and THOMAS M. FERDIG,

Defendants.

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OPINION AND ORDER

This matter is before the Court on: (1) a motion for summary disposition, pursuant to MCR 2.116(C)(7), (8), and (10), by OHC Liquidation Trust ("OHC") and Thomas Ferdig ("Ferdig"); and (2) Gregory A. VanDyke's ("VanDyke") motion for summary disposition pursuant to MCR 2.116(I)(2).

I.

VanDyke alleges that on April 7, 2003, he signed a Buy and Sell Agreement with Ferdig under which he contracted to purchase certain property commonly known as 34211 24 Mile Road in Chesterfield Township for \$224,900.00, with an appraisal value of \$230,000.00. In this regard, he alleges that he secured a mortgage through Great Lakes Mortgage Company and the closing transpired on May 16, 2003. He further alleges that at all times prior to closing, it was represented to him that the subject home was immaculate new construction that was being sold



by the builder, Ferdig. Accordingly, he maintains he reasonably believed that the home was stick built and new, immaculate construction, rather than premanufactured housing.

Plaintiff alleges that subsequent to closing, he discovered that the home was not newly constructed in 2001, but was manufactured in Indiana on September 15, 1999. He also alleges that he learned the home was actually built by Suburban Home Sales, Inc. ("Suburban"), rather than by Ferdig. It is his position that the home is valued at only \$174,000.00 due to its status as a premanufactured, rather than a stick, home. Moreover, he alleges that there were substantial defects in the property that were not disclosed by the seller. He alleges that his unilateral mistake was caused by defendants' advertisements, listing information, and purchase contract, all of which provided inaccurate, incomplete, insufficient, or misleading information.

In his first amended complaint, he has brought the following claims: Count I, rescission of contract on the ground of unilateral mistake against Suburban; Count II, rescission of contract on the ground of inadequate consideration against Suburban; Count III, intentional, negligent and/or innocent misrepresentation against Suburban; Count IV, contract reformation against Suburban; Count V, violation of the Michigan Consumer Protection Act ("MCPA") against Suburban and/or Ferdig; Count VI, negligence against Keller Williams Realty Lakeside Market Center, David M. Kluft, and Laurie Benigni, as buyer's agents; Count VII, intentional and/or innocent misrepresentation against Re/Max Advantage I, Inc., Thomas Figlan, and Roberta Rasmussen, as seller's agents; and Count VIII, intentional and/or innocent misrepresentation against Ferdig.

## II.

At the outset, the Court notes that Suburban went through bankruptcy proceedings and is no longer in existence. As the successor in interest, OHC brings the instant motion as to the

claims against Suburban and Ferdig, who was Suburban's employee or agent. OHC denies that Suburban and Ferdig engaged in improper conduct and points out that VanDyke had signed "as is," reasonable inspection, and release clauses. Further, OHC maintains that the MCPA is not applicable.

In his request for relief under MCR 2.116(I)(2), VanDyke contends that there is an outstanding factual dispute as to whether defendants made misrepresentations about the home prior to closing. He also asserts that the subject clauses are not controlling since defendants engaged in fraudulent conduct. Finally, he submits that the MCPA is relevant to the matter at hand.

### III.

The Court is mindful that OHC seeks relief pursuant to MCR 2.116(C)(7), (8), and (10). However, in light of the arguments raised and evidence submitted, the Court deems it appropriate to consider the motion as having been brought solely under MCR 2.116(C)(10) and will review it as such.

In reviewing a motion brought under MCR 2.116(C)(10), the trial court must consider the pleadings, as well as any affidavits, depositions, admissions, and documentary evidence submitted by the parties. The evidence should be construed in the light most favorable to the party opposing the motion. The motion should be granted if the evidence establishes that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. MCR 2.116(G)(4)-(5); *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). It is not sufficient for the non-movant to promise to offer factual support for his position at trial. *Smith, supra*, at 457-458 n 2. Instead, the adverse party must produce evidence demonstrating that there is a genuine issue of material fact. MCR 2.116(G)(4).

Further, MCR 2.116(I)(2) provides that:

If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party.

#### IV.

The Court is satisfied that VanDyke's claims essentially arise from two alleged wrongs: Suburban's and Ferdig's failure to disclose the premanufactured nature of the home and their failure to disclose certain defects.

To prevail on his fraudulent misrepresentation claims, VanDyke must establish: (1) Suburban and Ferdig made a material representation; (2) that was false; (3) when making such representation, they knew or should have known of its falsity; (4) they made the representation with the intention that VanDyke would act upon it; and (5) VanDyke did act upon it and suffered damages as a result. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 688; 599 NW2d 546 (1999). Further, VanDyke must demonstrate that his reliance on the alleged representation was reasonable. *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994). In other words, there can be no fraud if he had the means to determine that it was not true. *Id.* Fraud may also be consummated by the suppression of facts. *USF&G v Black*, 412 Mich 99, 125; 313 NW2d 77 (1981).

#### A.

The Court first finds that VanDyke has failed to prove fraudulent misrepresentation as to the property's status as a premanufactured home. VanDyke testified that he walked through the house prior to closing, at which time he noticed several stickers on the windows and near the sink area. *See* VanDyke's deposition at 57-64. The stickers were clearly visible and indicated

that the house was a “premanufactured unit.” *Id.* He further stated that defendants had not tried to remove or hide the stickers. *Id.*

The Court is therefore not convinced that VanDyke should prevail on the ground that he allegedly failed to read the stickers. Instead of ignoring the stickers, a reasonable person would have read them, which, in turn, would have prompted an investigation into the true nature of the house. Since VanDyke had clearly been afforded an opportunity to determine whether the subject representation was true, he cannot legitimately argue that he reasonably relied thereon. *Nieves, supra.*

Accordingly, OHC is entitled to the entry of summary disposition on this claim. The claims for contract rescission and reformation arising from the property’s premanufactured status are also properly dismissed inasmuch as they are interrelated to the fraudulent misrepresentation claim.

B.

The Court will next consider VanDyke’s claim for fraudulent misrepresentation as to certain defects which include, but are not limited to, the heating ducts, plumbing fixtures, phone lines, and prior damage in the amount of \$60,000.00.

The Court is mindful that VanDyke does not deny he signed “as is,” reasonable inspection, and release clauses. Notwithstanding, the Court points out that such clauses may be invalid if fraud was involved. *See Paterek v 6600 Ltd*, 186 Mich App 445, 449; 465 NW2d 342 (1990). After carefully reviewing the totality of evidence submitted, the Court is persuaded that there are numerous outstanding factual disputes, including, but not limited to: whether movants attempted to conceal the defects, whether they attempted to conceal prior damage, whether defendant knew or should have been alerted to the defects and/or prior damage before closing,

whether a house inspection would have revealed the defects and/or prior damage, and whether the present defects/damages arise out of the prior damage. Under these circumstances, neither side is entitled to the entry of summary disposition.

To the extent that the claims for contract rescission/reformation are based on fraud, they should also survive in light of the above ruling. However, dismissal is warranted to the extent that they allege inadequacy of consideration inasmuch as the Court will not inquire into the sufficiency of consideration to support a contract. *Gen Motors Corp v Dept of Treasury*, 466 Mich 231, 241; 644 NW2d 734 (2002).

C.

The Court next turns to the claim against defendants for unfair, unconscionable, or deceptive acts under the Michigan Consumer Protection Act (MCPA). Pursuant to MCL 445.904(1)(a), the MCPA excludes a transaction or conduct that is “specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.” Admittedly, residential builders are statutorily regulated under the Occupational Code (MCL 339.101, *et seq.*) and Michigan Occupational Safety and Health Act (MCL 408.1001 *et seq.*). Since the activity at issue--home construction--is regulated by Michigan law, it follows that same would fall within the parameters of this exemption.

However, in *Forton v Laszar*, 239 Mich App 711; 609 NW2d 850 (2000), our Court of Appeals examined an identical claim to the one at bar. There, the defendant questioned whether residential builders may be sued under the MCPA. Noting the issue was one of first impression, the Court found that they could: “Given that the clear legislative intent of the MCPA is to protect consumers in the purchase of goods and services, we conclude that the definition of ‘trade or commerce’ includes residential builders who construct and sell homes for personal family use.

Thus, residential builders are subject to claims of unfair or deceptive trade practices under the MCPA." *Id.* at 715.<sup>1</sup>

This Court is therefore bound to conclude likewise, that plaintiff's allegations pertaining to the unfair or unconscionably deceptive acts of defendants are covered under the MCPA, and plaintiff's claims to that end shall stand.

V.

Based on the foregoing, it is hereby

ORDERED OHC's motion for summary disposition pursuant to MCR 2.116(C)(10) is GRANTED IN PART AND DENIED IN PART. Pursuant to MCR 2.602(B), a judgment shall enter that is consistent with this *Opinion and Order*. It is further

ORDERED VanDyke's motion for summary disposition pursuant to MCR 2.116(I)(2) is DENIED.

In compliance with MCR 2.602(A)(3), the Court finds that this decision does not resolve the last pending issue and does not close the case.

SO ORDERED.

Peter J. Maceroni,  
Circuit Judge

**PETER J. MACERONI**  
CIRCUIT JUDGE

AUG - 1 2006

cc: Richard Smith  
Kellie Blair

A TRUE COPY  
CARMELLA SABAUGH, COUNTY CLERK

BY:  Court Clerk

<sup>1</sup> In *Forton* the plaintiffs hired the defendant, a licensed residential builder, to construct a residential home. Within a short time after moving into the home, the plaintiffs noticed several problems and defects in its construction. The plaintiffs filed suit against the defendant, alleging both breach of contract and violation of the MCPA based upon the